Supreme Court, U.S.
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No. 95-649

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

S. DIAMOND ASSOCIATES, INC.,
Petitioner,

v.

ORIGINAL APPALACHIAN ARTWORKS, INC.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Miles J. Alexander*
Jerre B. Swann
Kilpatrick & Cody
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
(404) 815-6500

*Counsel of Record

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QUESTION PRESENTED

The trial court having found judicial estoppel factually inapplicable to this case, and the Court of Appeals having held judicial estoppel legally irrelevant, the true question presented is whether this Court, in the abstract, should consider issues as to judicial estoppel that were not addressed in, and the resolution of which would have no impact on, either decision below, *i.e.*, whether this Court should render an advisory opinion.

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STATEMENT OF THE CASE

If there is a "conflict among the circuits over the application of judicial estoppel," as postulated by petitioner (Petition at 3), it is not framed by the history of this litigation. The trial court found that judicial estoppel was factually inapplicable; the Eleventh Circuit held that judicial estoppel was legally irrelevant. As a review of the proceedings leading to the Petition clearly reflects, only petitioner is endeavoring to play it "fast and loose" with the courts.

The Cabbage Patch Kids ("CPK") phenomenon erupted in 1983, becoming within a year the most successful doll program in history. R12-81-82.[1] In May 1985, Topps Chewing Gum Company ("Topps") launched the Garbage Pail Kids program that "derisively depicted dolls ... similar to Cabbage Patch Kids in rude, violent and frequently noxious settings," representing the antithesis of CPK's "lovable, very wholesome products." *Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc.*, 44 F.3d 925 (11th Cir. 1995); App. 2a n.1, 4a. Original Appalachian Artworks ("OAA"), the owner of CPK, initially deferred action, hoping that Garbage Pail Kids, like other gross parodies before it, would "go away." R12-128. When, however, the adverse publicity generated by the Garbage Pail Kids program began in early 1986 to injure CPK good will, OAA filed suit. R12-132; R13-384.

OAA's motion for a preliminary injunction was heard in June 1986 and, to counter Topps' "fair use" parody defense under the Copyright Act, 17 U.S.C. § 107 (4), OAA postulated, *inter alia*, that there was "direct competition" between Garbage Pail Kids bubblegum trading cards and CPK puffy vinyl stickers (as to which petitioner was the

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[1] References are to the trial court record (R__), the Appendix before the Court of Appeals (A__) and the Appendix to the Petition (App.__).

exclusive licensee).[2] OAA's principal concern, however, was injury to CPK good will (R12-136),[3] and all preliminary findings of harm were predicated on such injury. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum*, 642 F. Supp. 1031, 1036, 1040 (N.D. Ga. 1986) (Topps' conduct was variously characterized as "appropriating and using [OAA's] reputation," "deliberately trad[ing] on [its] good will," and "borrowing [its] good will to make it the butt of a joke").

Moreover, OAA's "direct competition" theory almost immediately encountered difficulty. When, for example, OAA in *Topps* sought information from petitioner's comptroller, it was informed that: (a) petitioner's puffy vinyl sticker market had collapsed before the advent of the Garbage Pail Kids program, (b) Topps' bubblegum trading cards and petitioner's puffy vinyl stickers were sold in different stores at different price points, and (c) there had been no competitive impact on petitioner's merchandise. R14-477-78. Far, therefore, from finding that "direct competition" had been "successfully asserted" (Petition at 10), the trial court in

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[2] As indicative of the relative significance of OAA's direct competition theory, the parties in this case quoted in three pages of proposed findings of fact all testimony at the *Topps* preliminary injunction hearing that concerned petitioner's rights; the *Topps* hearing transcript was 950 pages. In little more than a page, petitioner quoted every Finding of Fact and Conclusion of Law proposed by OAA at the preliminary injunction stage of *Topps* that mentioned petitioner; the proposals covered 94 pages. Accordingly, petitioner's assertion that damage to its stickers was "central to OAA's preliminary injunction motion" (Petition at 6) is a gross overstatement; neither petitioner nor its product was even mentioned in the decision preliminarily enjoining Topps' conduct.

[3] Preliminary injunction hearings intrinsically focus on such "irreparable" injury, not on the existence or quantum of actual damages, and OAA never undertook, preliminarily or otherwise, to calculate the financial impact attributable to its "direct competition" theory.

Topps openly expressed skepticism as to whether OAA had shown "actual financial damage" (A212-13), and in rejecting the "fair use" defense, **it did not adopt OAA's "direct competition" rationale.**[4]

After, therefore, a Price Waterhouse study showed that there was no correlation whatsoever between increasing Garbage Pail Kids sales and declining CPK sales (R13-284), and after petitioner's counsel again iterated immediately prior to the trial of *Topps* that petitioner had suffered no damage as a consequence of Topps' conduct (R14-578-79),[5] OAA informed Topps' counsel that it would not rely on "direct competition" as a damage theory (R14-581-82), and in OAA's brief on damage issues (A312-17), **filed the day before the *Topps* trial commenced**, it asserted only injury to its good will.[6] On the third day of trial, the matter was settled

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[4] Rather, the court relied on likely harm to the "potential market" for CPK products arising from the "serious negative impact" that the Garbage Pail Kids program imposed on CPK good will. 642 F. Supp. at 1035.

[5] The Eleventh Circuit's observation on the first appeal in this case that "OAA had begun to prepare Diamond's owner to testify at trial in the *Topps* case regarding the company's injuries" (App. 42-43a) is simply in error. R14-569. Not only had petitioner expressly denied injury, but its owner was only a "may call" rebuttal witness, and **damages are not proven in rebuttal.**

[6] Injury to good will is cognizable under the Lanham Act, *Heaton Distrib. Co. v. Union Tank Car Co.*, 387 F.2d 477, 485 (8th Cir. 1967); *Century Distilling Co. v. Continental Distilling Co.*, 205 F.2d 140, 146 (3d Cir. 1953), and where good will has been appropriated, profits or a reasonable royalty can be used to measure the recovery, *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 123 (9th Cir. 1968); *Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co.*, 349 F.2d 389, 397 (2d Cir. 1965); *Boston Prof. Hockey v. Dallas Cap*, 597 F.2d 71, 75-76 (5th Cir. 1979).

for payment by Topps to OAA of $7 million and a phase-out of the infringing Garbage Pail Kids images. A240-51.[7]

Thereafter, petitioner moved to intervene in *Topps*, but its motion was denied because it had "been aware of [the] litigation since its inception," and its motion was thus "untimely and would work a substantial prejudice to the existing parties." A252. In 1987, OAA then filed this action for a declaratory judgment that petitioner was not entitled to any portion of the *Topps* settlement.

In March 1989, in ruling on cross-motions for summary judgment in this case, the trial court held: (a) that to go behind the settlement to determine its purpose might undermine the strong federal policy in favor of settlements and (b) that OAA's fiduciary duty to petitioner would not require that "OAA equitably compensate Diamond [even assuming that] OAA recovered for the unauthorized appropriation of Diamond's rights." R5-90. In 1990, the Eleventh Circuit reversed, enunciating two bases pursuant to which petitioner might be entitled to a portion of the settlement:

> Diamond [would be] entitled to the proportion of the settlement that represent[ed] damages for Topps' appropriation of Diamond's exclusive license.
>
> [or]

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[7] Because the trial court in *Topps* did not adopt OAA's "direct competition" theory, and because the case was settled, petitioner's own authority would reject application of judicial estoppel theories. *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1038 (2d Cir. 1993); *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660 (Fed. Cir. 1988); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982); *Konstantinidis v. Chen*, 626 F.2d 933, 938-39 (D.C. Cir. 1980).

> Diamond [would be] entitled to the proportion of the settlement representing Diamond's injuries as a result of Topps' sales, even if the injury did not relate to a right that the licensing agreement expressly granted to Diamond.

Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc., 911 F.2d 1548 (11th Cir. 1990); App. 39-40a. The Court of Appeals stated that "the present case ... turns on a single issue: did Diamond suffer injury as a result of Topps' conduct?" *Id.*

The Eleventh Circuit noted the trial court's "finding that OAA's settlement with Topps constituted a recovery solely for the damage that the Garbage Pail Kids caused to the good will associated with the Cabbage Patch name." App. 36a. Nonetheless, given OAA's position at the preliminary injunction stage in *Topps* that Garbage Pail Kids products "directly competed" with CPK products, including petitioner's puffy vinyl stickers, the Court of Appeals held that there was an issue of fact as to whether petitioner suffered injury as a result of Topps' conduct. App. 43a.

After remand and additional discovery, the matter came to trial in June 1993, and in an Order dated July 30, 1993, the trial court concluded that "Diamond is not entitled to a proportion" of the *Topps* settlement. *Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc.*, 28 U.S.P.Q.2d 1545 (N.D. Ga. 1993); App. 31a. Noting that OAA, after the preliminary injunction hearing in *Topps*, had **abandoned** its "direct competition" theory as insupportable, the trial court found that: (a) petitioner's license had not been appropriated (App. 21-25a); (b) it had not been injured by Topps' sales (App. 27-30a); and (c) in either event, it had failed to show the proportion of the settlement reflecting its injury. App. 30a n.7. Specifically with respect to petitioner's assertions of judicial estoppel by reason of positions taken at

the *Topps* preliminary injunction hearing, the trial court observed that:

> statements made on behalf of OAA in the preliminary injunction hearing in the *Topps* case ... are **evidentiary admissions** which must be weighed in context. That is, the proposed findings of fact and conclusions of law at the preliminary injunction stage were based on limited discovery and reflected positions taken by counsel at that time rather than facts supported by the evidence. According to Mr. Nodine, OAA's counsel in the *Topps* case, the findings of fact and conclusions of law demonstrated counsel's positions at the time, many of which were later abandoned based on further discovery and counsel's evaluation of evidence that could not be proven at trial.
>
> * * *
>
> Much confusion in this case stems from the original depositions and positions of counsel taken by OAA in the *Topps* case. During the *Topps* preliminary injunction hearing, counsel for OAA took the position that it was entitled to recovery as a result of direct competition.... OAA was unable to support this position with evidence.... [A]s a result of this lack of evidence of direct competition OAA changed the trial strategy in the *Topps* case to represent the damage that the Garbage Pail Kids had on OAA's good will and the Cabbage Patch Kids' image.... OAA's position at the preliminary stages of the *Topps* case became untenable, and ... [t]he great weight of evidence at this trial has shown that there was no direct competition.

App. 24a, 28a (emphasis supplied).[8]

In affirming, the Eleventh Circuit did note, **in dictum**, that Georgia law cautioned "as to the semantical dangers which surround the term 'judicial estoppel' and similar matters of issue preclusion." App. 10a.[9] Conclusively, however, for the purposes of this petition, the Court of Appeals **held** that it "**need not decide** ... whether OAA should be judicially estopped from denying that Diamond was damaged by Topps' conduct." App 11a (emphasis supplied).[10] Rather, as to the first issue that the Eleventh Circuit had previously posed -- whether Topps had appropriated petitioner's exclusive license -- the Court held that the "unambiguous terminology" of the license agreement, which could not be altered by "extrinsic circumstances," established that Topps "did not invade Diamond's exclusive domain." App 11-12a.[11] As petitioner's own expert testified

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[8] The trial court's findings rejecting judicial estoppel, and its findings as to all other factual issues before it, were clearly "plausible in light of the record viewed in its entirety ...." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985).

[9] Because it was not necessary for it to do so, the Eleventh Circuit did not further divine the Georgia rule as to judicial estoppel, and as a review of the cases cited by petitioner will reflect, Georgia courts are in the substantial majority in expressing reservations about formalistic applications of this doctrine.

[10] Petitioner's statement that the Eleventh Circuit refused "to apply judicial estoppel in this diversity case" in conflict with decisions of the Fourth and Sixth Circuits (Petition at 12), is thus a patent misreading of the Eleventh Circuit's opinion.

[11] The trial court concluded not only that the license was unambiguous, but that extrinsic evidence also supported OAA's position that it extended only to specific "items," not to a "category" of products, noting, *inter alia* (App. 22-23a), that:

at trial, it got everything it asked for in its item-specific license and it did not ask for rights to bubblegum trading cards. R15-747.

As for the second issue -- whether any proportion of the settlement nonetheless represented injury to petitioner -- OAA's statements at the preliminary injunction hearing in *Topps* only created a "genuine issue of material fact." App. 43a. Petitioner still had the burden of proof as to the quantum of its damages, and its sole theory in that regard[12] was "completely dependent" on the **rejected** proposition that its exclusive license had been invaded. App. 12-13a. Wholly apart, therefore, from any consideration of judicial estoppel, the Court of Appeals endorsed the finding of the trial court that petitioner "offered no method to **quantify** [its] injury or to determine what **proportion** of the settlement was attributable to that injury." App. 9a (emphasis supplied).

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1. all of OAA's more than 120 other licenses were item licenses;
2. in correspondence after execution of the license, petitioner sought to "add the kind of stickers that Topps does" (A219-20);
3. one of petitioner's own experts testified that the license was not a broad category license; and
4. petitioner's category licenses with other property owners contained very different language.

[12] Petitioner's expert postulated that Topps' conduct should be treated as a "**legitimate** sublicense," a theory rejected by every fact in the record: *e.g.*, whereas a legitimate sublicense enhances the good will of the property owner and does not harm other viable licensees, Topps' conduct had the reverse effect.

SUMMARY OF ARGUMENT

The **abstract** question presented by petitioner is whether there ought to be a uniform federal rule as to judicial estoppel applicable both to federal question and diversity jurisdiction cases. This Court, however, does not resolve issues in the **abstract**. Here, after a fact-intensive inquiry, the trial court determined that OAA's recognition that one component of its preliminary position was untenable, and its adoption of a new strategy for trial that comported with the facts, did not rise to the level of judicial estoppel. The Court of Appeals determined that, irrespective of judicial estoppel, petitioner had not established critical elements of its case.

In seeking a preliminary injunction against Topps, OAA attempted to prove that there was direct competition between Garbage Pail Kids bubblegum trading cards and CPK puffy vinyl stickers. When OAA learned that petitioner could not support that position, and when other evidence conclusively rejected the existence of direct competition between Garbage Pail Kids and CPK products, OAA abandoned the theory. OAA effectively engaged, therefore, only in the time-honored practice, expressly embodied in Rule 15(b) of the Federal Rules of Civil Procedure, of amending its pleadings to conform to the evidence. The only party seeking to play "fast and loose with the courts" by changing a position "simply because his interests have changed" (Petition at 14) is the petitioner, who would now retract repeated admissions as to the absence of any injury resulting from Topps' conduct.

Even were it otherwise, petitioner was required to prove: (a) that it was injured by Topps' appropriation of its exclusive licensing rights, or by Topps' conduct; and (b) the proportion which that injury bore to the Topps/OAA settlement. Wholly apart from considerations of judicial estoppel, the Court of Appeals held that petitioner's license

did not encompass Topps' activity and that petitioner's only theory of injury was predicated on a non-existent invasion of its license rights. Irrespective, therefore, as to whether OAA was judicially estopped to contest the **fact** of petitioner's injury, there was a failure of proof as to its **amount** or as to its **proportional** relationship to the damage that Topps inflicted on other parties.

Accordingly, in the "case or controversy" before this Court, there is simply no factual or legal basis for deciding whether or not there should be a uniform federal rule as to judicial estoppel. The trial court found as a matter of fact, **not here contested by petitioner**, that OAA was not judicially estopped to contest petitioner's entitlement to a proportion of the settlement with Topps. The Eleventh Circuit found as a matter of law, **not here contested by petitioner**, that it need not address judicial estoppel in affirming the trial court's result. At every level, therefore, and from every perspective, any opinion rendered as to judicial estoppel by this Court in this case would be wholly advisory.

ARGUMENT

I. JUDICIAL ESTOPPEL IS FACTUALLY AND LEGALLY IRRELEVANT TO THIS CASE

Factually, the trial court held in this case that OAA did not, as suggested by petitioner (Petition at 18), endeavor "to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings." Rather, as OAA's investigation in *Topps* progressed, it determined that its "direct competition" damage theory was "untenable" and it thus "changed [its] trial strategy" to focus on injury to good will. Accordingly, its "evidentiary admissions" at the preliminary injunction

stage of *Topps* were factually overcome by "the great weight of evidence ... that there was no direct competition" between Garbage Pail Kids bubblegum trading cards and Cabbage Patch Kids puffy vinyl stickers, and a decision by this Court that there should be a uniform federal rule as to judicial estoppel, applicable to both federal question and diversity cases, would have no impact on the trial court's result.

Legally, the Court of Appeals held that it "need not" address judicial estoppel issues because the "evidence" to which petitioner would bind OAA was irrelevant to the unambiguous scope of petitioner's license rights, and since petitioner's damage theory was based on an incorrect reading of its rights, its case failed for want of proof. Again, a decision by this Court that there should be a uniform federal rule as to judicial estoppel, applicable to both federal question and diversity cases, would have no impact on the Eleventh Circuit's result. Judicial estoppel was not a factor in its affirmance of the trial court's judgment, and whether there is a conflict among Circuits with respect to the application of judicial estoppel in diversity cases must await a decision that addresses such issues.

II. CERTIORARI SHOULD NOT BE GRANTED TO CONSIDER ISSUES IMMATERIAL TO THE DECISIONS BELOW

The Supreme Court "does not sit to satisfy scholarly interest[s]" by resolving issues that "abstractly considered, [may be] intellectually interesting...." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955); *see The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). Here, to reiterate, the Eleventh Circuit explicitly held that it "need not decide ... whether OAA should be judicially estopped from denying Diamond was damaged by Topps' conduct" (App. 11a), and the Supreme Court "usually will

decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

In reviewing state court judgments resting on an independent and adequate state ground, this Court observed in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) that:

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Here, the judgment of the Eleventh Circuit will not be impacted irrespective of what might be this Court's views of judicial estoppel; those views would be truly advisory.

III. THE TOPPS CASE AND ITS SETTLEMENT SIMPLY WERE NOT ABOUT PETITIONER'S LICENSE RIGHTS

Sales of puffy vinyl stickers having plummeted in the fourth quarter of 1984, well before the Garbage Pail Kids program was launched, petitioner reported to OAA in 1985 that puffy vinyl sticker prospects were "gloomy."[13] A188. In early 1986, well before the Garbage Pail Kids program peaked, petitioner wrote OAA that puffy vinyl stickers were a "thing of the past."[14] A189. Petitioner's expert testified that

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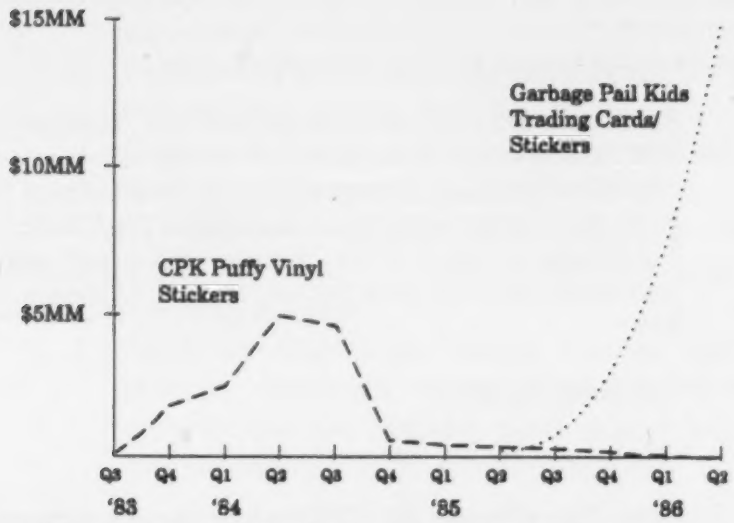
[13] From the third quarter of 1984 to the fourth quarter, petitioner's sales of puffy vinyl stickers declined from $4,031,529 to $728,950. In the fourth quarter of 1985, sales plummeted further to $23,470. A323.

[14] Petitioner requested OAA's "help and understanding" in permitting it "to continue to supply [its] few customers with product [from existing

because of product overproliferation and cut-throat pricing, puffy vinyl stickers as a category had "killed itself." A269-70. Petitioner's sales of puffy vinyl stickers in 1986 ran at less than 2% of their 1984 level and constituted less than 0.1% of the CPK program. R12-114. Petitioner's expert agreed that as of 1986, its CPK license had no value. R13-348.

Petitioner's representatives thus clearly spoke the truth in **twice** denying that it had been injured by Topps' conduct. A simple line graph clearly establishes that there was no correlation whatsoever between declining CPK puffy vinyl sticker sales and increasing sales of Garbage Pail Kids merchandise:



The former had clearly evaporated before the latter commenced.

The *Topps* case was not thus focused on injury to petitioner's puffy vinyl sticker rights. Rather, the case was

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inventory], but to do so without [paying the $15,000] guarantee" specified in the renewal clause of the license. A189.

about injury to CPK good will which, by the express terms of petitioner's license, was owned exclusively by OAA (A130):

> 1. Injury to good will in *Topps* was the principal concern of CPK's creator (R13-388), of OAA's president (R12-136) and of CPK's licensing agent.[15] It was the sole concern of OAA's expert witness[16] whom both the trial judge in *Topps* and in this case (App. 29a) expressly found to be credible. CPK were lovable, one-of-a-kind and adoptable, and generated a unique bond between child and doll which the negative Garbage Pail Kids images directly undermined. R12-83, 129, 132.[17]

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[15] As the licensing agent testified, Garbage Pail Kids:

> put an onus and a stigma on the purchase of a "Cabbage Patch Kid." **This is really at the heart of it.** Instead of being a source of pride in having not just one but having many Cabbage Patch Kids, there is unquestionably ... a potential for a child to be embarrassed by virtue of the "Garbage Pail Kids," and that association will make them not want to have a Cabbage Patch Kid.

A205-07 (emphasis supplied).

[16] Mr. Robinson testified that Garbage Pail Kids:

> holds this affection [for CPK] which is very personal to children up to ridicule and ... will seriously make them feel that their peers are laughing at them, and ... they will become very self-conscious about their relationship with their own adopted child ... and this self-consciousness will detract irreparably from the sale of the product.

A211; *also see* A205-07.

[17] One of petitioner's experts considered Garbage Pail Kids so "detrimental to the [CPK] property" and so offensive that, as a licensing

2. As one of petitioner's experts conceded (R15-717), injury to good will was the pervading theme of the order in *Topps* granting OAA's motion for a preliminary injunction, repeated under the headings for copyright infringement (642 F. Supp. at 1033-36 [Topps sought to "'augment the commercial value of its property by creating detrimental associations with'" CPK]); for trademark infringement (*id.* at 1036-39 [consumers could not "'disassociate'" Garbage Pail Kids from CPK which would "'injure [OAA's] business reputation'"]); and for dilution (*id.* at 1039-40 [Garbage Pail Kids created an "undesirable, unwholesome and unsavory mental association" with CPK]).
3. Petitioner and its experts agreed that OAA's good will had been injured. R15-703; A279.
4. Garbage Pail Kids could not have existed without feeding on CPK good will. R13-342-43.

The *Topps* case was also about injury to OAA's viable licensees,[18] principally to Coleco which had more than $225 million in sales in 1986:[19]

1. Injury to doll sales, caused by the negative publicity generated by the Garbage Pail Kids program and the resulting adverse peer pressure exerted on key CPK purchasing segments, was the

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agent, he had rejected an opportunity to handle the Garbage Pail Kids program. A263-66.

[18] Sales of "peripheral" products, not directly related to the nurturing of the core property, always decline first (A296), and by 1986, therefore, the CPK puffy vinyl sticker license was no longer viable.

[19] Coleco expressly assigned all of its rights in *Topps* to OAA. R12-140.

principal concern in the marketplace. R12-55-56, 62-63; A298-300, 304-05.

2. Both of petitioner's experts (R15-722; A279) and petitioner's owner (R16-928) agreed that Coleco had been damaged.
3. It was established in this case that doll sales were negatively impacted by $50 million in 1986 alone.[20]

Perhaps, therefore, the most blatant flaw in petitioner's argument below was that, pursuant to its only damage theory, it would have been awarded $3.5 million of the $7 million Topps settlement, predicated on total sales during the period of infringement of $150,000, and Coleco, with sales 1500 times greater than petitioner's, would have been awarded nothing.[21]

IV. IN ANY EVENT, THERE IS NO SHOWING THAT OAA WAS JUDICIALLY ESTOPPED TO CONTEST PETITIONER'S INJURY

OAA wanted to prove at the preliminary injunction in *Topps* that Garbage Pail Kids trading cards competed directly

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[20] From 1983 through 1985, 52-53% of CPK sales were to children eight and older (Px. 145), the group most sensitive to peer pressure (R12-56, 136); in 1986, by reason of the negative publicity generated by the Garbage Pail Kids program, the percentage dropped to 42%, a sharp reduction in sales to the group (R12-62-63); had, in 1986 alone, the eight and older group continued to represent 52% of CPK purchasers, Coleco's sales, by application of simple mathematics, would have been approximately $275 million, as opposed to $225 million.

[21] Moreover, while seeking an after-the-fact option to participate in the only enforcement action to produce a significant net return, petitioner did not offer to participate in the $5.4 million that OAA had expended in *Topps* and earlier actions to protect the CPK property.

with petitioner's puffy vinyl stickers. When OAA was unable to do so, and when other evidence suggested unequivocally that there was no direct competition between the products, OAA was not legally required to continue pursuit of an untenable proposition. Rather, the cases cited by petitioner, *e.g.*, *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984), and the Federal Rules of Civil Procedure, expressly permit pleadings in the alternative and changes of position prior to final judgment.

In this case, as the trial court held, "the great weight of the evidence" rejected the existence of direct competition (App. 27-29a):

1. One OAA expert testified that bubblegum trading cards and puffy vinyl stickers move at different price points through different trade channels and have different end uses.
2. Another OAA expert testified that even when bubblegum trading cards and puffy vinyl stickers are sold in the same stores, *e.g.*, Walmart, they are sold in different departments to different consumers.
3. A third OAA expert testified that not only is there no competition between bubblegum trading cards and puffy vinyl stickers, but that the "hard" Garbage Pail Kids images appealed to older boys whereas the "soft" CPK images appealed to younger girls.
4. Petitioner's expert agreed that the commercial appeal of CPK differed from that of Garbage Pail Kids -- that a child desiring one would not accept the other as a substitute.
5. To iterate, Price Waterhouse concluded, based on a contemporaneous study of the results from the

> only company licensed to market both images that there was no correlation between decreasing CPK sales and increasing Garbage Pail Kids sales.

OAA simply cannot be held to a position that all the evidence and petitioner itself repeatedly rejected.[22]

Stated differently, there is simply no record support whatsoever for petitioner's bald assertion that "[i]f the present case had been based on federal question jurisdiction, the court below would have looked 'to common law or to the policies supporting the [judicial estoppel] doctrine itself for guidance in establishing an appropriate formulation' [citation omitted], and reached an opposite result." Petition at 18. Indeed, there is no analysis of how a purported federal rule as to judicial estoppel would differ from the Georgia rule or the rule in any other state; there is no analysis of how the trial court's application -- "evidentiary admissions" undercut by evolving facts and ultimately rejected by the "great weight of evidence" -- is inconsistent with any federal rule that might be adopted.

If the petitioner could demonstrate: (a) that courts below had clearly held, as a matter of law, that judicial estoppel was not applicable in Georgia; (b) that Georgia was out of step with policies elsewhere; and (c) that the application of a uniform federal rule to the facts of this case would have produced a different result -- then there might exist a question meriting this Court's consideration. **Not even one** predicate exists, however, for invoking this Court's review.

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[22] It would be truly ironic to hold OAA to its preliminary position and to permit petitioner to recover for its "injury" when petitioner's repeated disclaimers of injury constituted one reason for OAA's abandonment of a direct competition theory.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted this 21st day of November, 1995,

Miles J. Alexander*
Jerre B. Swann
Kilpatrick & Cody
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
(404) 815-6500

*Counsel of Record